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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 821

BADGER-METER MANUFACTURING COMPANY,

Petitioner;

v.

JAMES B. BRENNAN, in his capacity as United States Attorney for the Eastern District of Wisconsin; and EMIL J. NELSON, in his capacity as District Director of Internal Revenue,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Jesse Climenko, attorney for the petitioner Company, prays on its behalf that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit dismissing the Company's appeal from a judgment of the District Court for the Eastern District of Wisconsin. An Appendix is separately presented.

OPINIONS BELOW

Neither opinion is reported. The district court's opinion is Appendix B.[1] The opinion of the court of appeals is Appendix E.

The Company's entire case on this petition is based on questions of law, and the facts found by the district court are accepted.[2]

JURISDICTION

The judgment of the court of appeals was dated and entered on November 29, 1962.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1); the third, fourth and fifth clauses of Rule 19(1)(b) of this Court; and because there exists in this case what we believe to be a special and important reason for review on writ of certiorari.

That reason rests upon the interpretation apparently given to *DiBella v. United States*, 369 U.S. 121, by the court of appeals. That interpretation applies to all citizens of at least the Seventh Circuit (as well as the Company) against whom no criminal case ever existed, and against

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[1] The Company's action was consolidated for trial and in the opinion with a separate motion to suppress made by Berner, a Company officer.

[2] The property whose return is sought is referred to herein as Company property. The district court's consolidated opinion stated that "The title as between the two petitioners [the Company and Berner] to the ledgers which, we assume, are the prime evidentiary matter sought to be suppressed, need not and cannot on the record before us be determined." (App. B, p. 21; R. 78, 79). As to the "cannot", the court obviously overlooked Berner's formal agreement that "For the purposes of the hearing and decision on this pre-indictment motion to suppress, the Court may assume that all of the records in question were corporate records." (App. C, p. 22; R. 88).

whom all future prosecutions are time-barred.* It denies to such citizens all right to have reviewed on the merits a trial court's conclusion that a search and seizure of their property by Internal Revenue Agents was lawful, and the court's refusal to order their seized property returned to them. A decision that such a seizure was unlawful, and the consequent return to a citizen of his seized property, are both of major importance to his ability to defend against the assessment of, or to recover, actual penalties founded on the fruits of the unlawful search and seizure by federal officers.

THE QUESTIONS PRESENTED FOR REVIEW

Introduction To The Circumstances Of The Case

The following circumstances apply to all the questions presented. No criminal case ever existed against petitioner, and all future prosecutions relating to any tax year in question were barred by the statute of limitations. The petitioner's requests for relief were grounded upon alleged unlawful searches for and seizures of its property by Internal Revenue Agents. The parties agreed prior to trial that if petitioner were successful they would attempt to stipulate as to the items of property to be returned.

The Questions For Review

(1) A petition to the district court requested both the return and the suppression of property. The request for

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*"Criminal case" is used in this petition in all senses encompassed by *DiBella v. United States*, 369 U.S. 121, 131; *Grant v. United States*, 369 U.S. 401 (reported below: 291 F. 2d 227); *Murphy v. United States*, 369 U.S. 402 (reported below: 290 F. 2d 573); and *Greene v. United States*, 369 U.S. 403 (reported below: 296 F. 2d 841).

suppression served no actual need or purpose. It was included because of the misrepresentation of Revenue Agents that a criminal income tax investigation was directed at the petitioner, rather than at another person, who actually was its sole target. The district court denied both requests in an order for dismissal which directed that a "final judgment" be entered in the above-entitled "[civil] action". The form of the order was approved by the respondents' attorney prior to its entry. The question thus presented is: In what past, present or future criminal case against the petitioner was the judgment a mere interlocutory non-appealable order, as the court of appeals held on respondents' motion to dismiss?

(2) The court of appeals, in dismissing petitioner's appeal, summarily denied the return of petitioner's property without considering whether petitioner might be entitled to that relief, even though not entitled to suppression. The question thus presented is: When the court of appeals departed from the rule that if a party has proved himself entitled to any relief his action will not be dismissed because he has erred as to legal theory and is not entitled to all of the relief he requested in his pleadings, did the court of appeals so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

(3) Did the court of appeals, in holding the judgment of the district court to be interlocutory and not appealable, decide that question in a way in conflict with the essentially practical tests adopted in applicable decisions of this Court for identifying those judgments which are, and those which are not, to be considered "final"?

(4) May not the errors of the court of appeals referred to in Questions (1), (2) and (3) have been, and

may not similar errors by other courts be, induced by a too-literal interpretation of the following sentence, and particularly the word "solely", appearing at pages 131 and 132 of 369 U.S., in the *DiBella* opinion:

> "Only if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent.";

and, therefore, ought not this Court clarify such sentence so as (a) to preclude the incongruities implicit in Question (1); (b) to reconcile the *DiBella* opinion with the rule referred to in Question (2); and (c) to effectuate the *DiBella* opinion's pragmatic approach to the question of finality?

(5) The decision in *DiBella* settled a question of law which for many years had received conflicting and confused treatment by the federal courts. The petitioner's action was filed in June, 1959, almost three years before the *DiBella* decision. A decision in petitioner's action prior to *DiBella*, even if the action had been a motion for suppression under Rule 41(e) of the Federal Rules of Criminal Procedure, and even if there had been a criminal case in being against the movant, would have been appealable in, among others, the circuit in which the motion was filed, because the motion preceded any indictment of the movant. The question thus presented is: Whether this Court, in the exercise of its sound judicial discretion and its power of supervision, ought not to afford the prejudiced petitioner its one and only opportunity to have reviewed on the merits the denial of its request for the return of its property, by vacating the judgment of the court of appeals and remanding the case for review on the merits?

THE STATUTES AND RULES INVOLVED

The statutes are 28 U.S.C. §1254(1) and §1291.[4]

The provisions of the Federal Rules of Civil Procedure are Rule 1, second sentence; Rule 8(a), second sentence; Rule 8(f); and Rule 54(c), second sentence.

The above statutes and provisions of the Rules are set forth in Appendix F.

STATEMENT OF THE CASE ON THIS PETITION

In June, 1959, the Company petitioned the district court for two principal kinds of relief, i.e., the return of its property, and its suppression in any criminal proceeding against the Company, its officers or employees. (App. A, pp. 1-4; R. 3-5, 15).

The jurisdiction of the court was invoked under 28 U.S.C. §1346(a)(2). The grounds for jurisdiction were that property of the Company had been searched for and seized from it by Revenue Agents in violation of the Company's rights to due process under U.S. Const., Fourth Amendment, Clause 1; in violation of its rights to due process and fair play under §§10 and 2(a) and (f) of The Administrative Procedure Act, Act of June 11, 1946, C. 324; 60 Stat. 237; (Public Law 404), as amended; in violation of its rights to administrative due process under certain internal regulations of the Revenue Service (Pet. Exs. 15, R. 418; 17, R. 420; 18, R. 421; and 20, R. 423, all offered and received without objection at R. 327); and because the persons in possession of the

[4] References to the United States Code are to the 1958 edition, as amended to the close of the 1st session, 87th Congress, on January 9, 1962.

property were officers of the court. The factual background for these grounds of relief is summarized in Appendix G, which is entitled "Statement Of The Case Which Will Be Reviewed If The Judgment Of The Court Of Appeals Is Vacated".

The Agents misrepresented to the Company that a criminal tax investigation was directed against the Company. (App. B, pp. 8, 10, 11, 18, 19; R. 67, 69, 70, 76, 77). The fact that its sole target was Berner, a Company officer, was concealed, and not revealed until the court examined the informer's affidavit during the trial. (See Appendix and Record references following the next preceding sentence; and App. B, p. 8, n. 1; R. 68).

The district court found that there had never been any criminal case against the Company, that none was in being, and that all future prosecutions for the tax years involved were time-barred. (App. B, pp. 8, 10, 11, 13, 18, 19; R. 67, 69, 70, 72, 76, 77).

In September, 1962, the district court, after written approval of the form of the order for judgment by the attorney for the respondents, ordered that a "final judgment" be entered in petitioner's "Civil Action No. 59-C-119", denying all "the relief requested in the above-entitled action by the Petitioner" and that "this action be dismissed." (App. D, pp. 24, 25; R. 80, 81).

The Company appealed from the opinion and decision, the order for judgment, and the judgment of the court. (R. 83). The respondents moved to docket and dismiss the appeal, on the ground that the judgment was interlocutory and not appealable, under *DiBella v. United States*, 369 U.S. 121. (R. .....). The court of appeals so held. (App. E, p. 26; R. .....).

This petition is for a writ of certiorari to review that holding.

REASONS FOR GRANTING THE WRIT

The district court's decision is open to question on at least three conclusions of law, to which we have pointed in App. G, pp. 30-32. They have received differing treatment in the several circuits, and have not been settled, to our knowledge, by this Court. Nevertheless, the court of appeals peremptorily refused to review the district court's decision. (App. E, p. 26; R. .....).

Failing review on certiorari, the appellate court's refusal will establish throughout the Seventh Circuit, at least, a rule to the effect that a technical, legal error (in this case, the inclusion in a petition of a request for suppression induced by the misrepresentations of federal officers as to the target of a criminal investigation), which was not an error when made (and if it ever was an error, only became one in retrospect three years later, upon issuance of the opinion in *DiBella v. United States*, 369 U.S. 121), is sufficient ground to foreclose any review of a district court's decision on the merits.

Such a rule will be unfortunate in any type of case, much less in a case, such as this one, where the issues approach or attain constitutional dimensions. Its result will be that citizens of the Seventh Circuit, against whom no criminal case ever existed or will exist, will be deprived, on the most hair-splitting of technicalities, of any possible review of the merits of district court decisions which are of major importance to their ability to defend against the assessment of, or to recover, actual penalties founded on the fruits of unlawful searches and seizures effected by federal officers. *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 509, 510; *Lipke v. Lederer*, 259 U.S. 557, 562; *Tovar v. Jarecki*, 173 F. 2d 449 (7 Cir. 1949); and, c.f., *Enochs v. Williams Packing Co.*,

No. 493, October, 1961, Term; decided May 28, 1962 (30 U.S. Law Week 4400, 4402; 370 U.S. 1, 6 [Prelim. Print]); and *United States v. Sanchez*, 340 U.S. 42, 45.

We submit that the error inherent in the peremptory denial of review is rendered self-evident by the incongruity of any answer to Question (1) presented above, other than the answer "None".

The rule stated in Question (2) above is set forth in 6 Moore, *Federal Practice* (2d ed. 1953) para. 54.62, at page 1208, and the numerous authorities are collected in notes 8 and 9 on that page. And see, e.g., *Conley v. Gibson*, 355 U.S. 41, 48; *Maty v. Grasselli Chemical Co.*, 303 U.S. 197, 200; and Federal Rules of Civil Procedure, 1, second sentence; 8(a), second sentence; 8(f); and 54 (c), second sentence.

In answer to Question (3) above, it is clear that the holding of the court of appeals was in direct conflict with the essentially practical tests developed by this Court for identifying those judgments which are, and those which are not, to be considered "final". *Brown Shoe Co. v. United States*, No. 4, October, 1961, Term; decided June 25, 1962 (30 U.S. Law Week 4561, 4564, 4565; 370 U.S. 294, 306, 309 [Prelim. Print]); and the cases there cited. Those tests were satisfied in this petitioner's case. No possibility existed of repetitive consideration of petitioner's action for return of its property in any criminal case against petitioner. Hence, the propriety of the district court's denial of such return was ripe for review in the appellate court. However, such review has been foreclosed to petitioner forever, absent review on writ of certiorari.

Question (4) above may, and we suspect does, reveal the source of the errors of the court of appeals referred

to in connection with Questions (1), (2) and (3). The court stated it based its dismissal of petitioner's appeal on the "doctrine and principles" of *DiBella v. United States*, 369 U.S. 121. (App. E, p. 26; R. .....). The brevity of the court's order sheds no light on the aspect of the doctrine and principles which the court believed applicable. Certainly, no criminal case ever existed against this petitioner. Nothing we have discovered in the opinion or rationale of *DiBella* made the judgment of the district court in petitioner's action anything less than the final, appealable judgment in a civil action which the district court intended it to be, and which the respondents agreed that it was at the time the judgment was ordered entered. (App. D, pp. 24, 25; R. 80, 81).

Therefore, we suspect and suggest that the word "solely" in the following sentence, again quoted from pages 131 and 132 of 369 U.S., in the *DiBella* opinion, may have persuaded the court of appeals that the peremptory dismissal was required:

> "Only if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent."

Distinguishing between words, and the doctrine and principles of the *DiBella* opinion, we are impelled to present Question (4) above for this Court's consideration. We suggest that the word "solely" in the sentence quoted above, without further explanation, actually and directly conflicts with, and is and will prove to be an obstruction to, the application of the pragmatic tests of finality of judgments with which the doctrine and principles of *DiBella*, in every other respect, are entirely consistent.

In respect of the circumstances set forth in connection with Question (5), the appealability in the Seventh Cir-

cuit prior to *DiBella* of the denial of this petitioner's mistaken and unnecessary pre-indictment request for suppression was established by the following decisions of the court of appeals for that circuit, i.e., *Veeder v. United States*, 252 Fed. 414 (1918), certiorari denied, 246 U.S. 675; and (by implication) *Socony Mobil Oil Co. v. United States*, 275 F. 2d 227 (1960). This Court heretofore has exercised its sound judicial discretion, when the Court suddenly has changed or settled a rule of law, to take the action which an affirmative answer to Question (5) would require. *Reconstruction Finance Corp. v. Prudence Group*, 311 U.S. 579, 582, 583; *Rorick v. Board of Comm'rs of Everglades Drainage Dist.*, 307 U.S. 208, 213.

CONCLUSION

This petitioner requests, for the reasons set forth above, that this petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit be granted, and that thereupon the judgment of said court be vacated and the case referred to herein be remanded to said court for review on the merits; or, in lieu of such remand and review, that this Court grant to petitioner such other and further relief as to this Court, in the exercise of its supervisory powers and discretion, may appear just, equitable and advisable.

Respectfully submitted,

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APPENDIX A

3 IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

BADGER METER MANUFACTURING COMPANY, *Petitioner and Movant,* *v.* EDWARD G. MINOR, in his capacity as United States Attorney for the Eastern District of Wisconsin; and EMIL B. NELSON, in his capacity as District Director of Internal Revenue; *Respondents.*	NO. 59-C-119 PETITION AND MOTION FOR THE RETURN OF SEIZED PROPERTY AND THE SUPPRESSION OF EVIDENCE

THE RELIEF REQUESTED

Badger Meter Manufacturing Company, a Wisconsin corporation, with an office in Brown Deer, in Milwaukee County, Wisconsin, which has at all times filed its income tax returns at the office of the District Director of Internal Revenue in Milwaukee, Wisconsin, hereby respectfully petitions and moves that this Court

(I) order that there be returned to the petitioner all copies, data, memoranda and computations made and excerpts taken by either or both Franklin P. Graf, an Internal Revenue Agent (hereinafter called "Revenue Agent Graf") and Frederick C. Stieber, Special Agent (hereinafter called the "Special Agent"), in the course of their examinations of the books of account, correspondence files, expense reports and other books and records of the petitioner

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4 during the period commencing on or about July 5 and ending on or about July 28, 1954;

(II) order that all the copies, data, memoranda, computations and excerpts referred to in (I) above, and all clues, leads, knowledge, information, material and evidence (hereinafter called, collectively, "secondary evidence") directly or derivatively obtained as a result of the examinations referred to in (I) above, be suppressed as evidence against either or both the petitioner or any past or present officer or employee of the petitioner, including Philip J. Berner (hereinafter called "Berner"), Secretary and Treasurer of the petitioner, in any preliminary examination, Grand Jury hearing or other criminal proceeding against any or all of them;

(III) order that there be returned to the petitioner all copies of two books (hereinafter called the "ledgers"), one being a two-post ledger containing 191 pages and the other being a three-ring binder containing ninety-three pages, which were produced by Berner on March 4, 1955, pursuant to the Special Agent's summons to testify and produce them, the originals and all copies of advance and expense checks referred to in the ledgers, and the related expense reports, supporting documents and correspondence, and all excerpts taken and data, memoranda and computations made or derived therefrom or by means of the use thereof, which are in the possession or under the control of either or any of the respondents or any attorney, agent or employee of the Department of Justice or the Internal Revenue Service;

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(IV) order that the originals of the ledgers, all copies thereof, all the originals and copies of the checks, expense reports, supporting documents and correspondence, and the excerpts, data, memoranda and computations referred to in (III) above, and all secondary evidence directly or derivatively obtained by means of the use of any thereof, be suppressed as evidence against either or both the petitioner, or any past or present officer or employee of the petitioner, including Berner, in any preliminary examination, Grand Jury hearing or other criminal proceeding against any or all of them; and

(V) permanently restrain the respondents and all attorneys, agents and other employees of the Department of Justice and the Internal Revenue Service from using as evidence in any preliminary examination, Grand Jury hearing or other criminal proceeding against either or both the petitioner, Berner or any other past or present officer or employee of the petitioner, and from disclosing to any other person or governmental department or agency any of the copies, data, memoranda, compilations and excerpts, ledgers, checks, expense reports, supporting documents and correspondence, the secondary evidence, and the contents of any thereof, referred to in (I), (II), (III), and (IV) above.

* * * * * *

(*Appendix A*)

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15 PRAYER FOR RELIEF

Wherefore, the petitioner prays that this Court enter its orders

(A) granting to the petitioner the relief delineated in paragraphs (I), (II), (III), (IV) and (V) set forth first above under the caption "THE RELIEF REQUESTED"; and

(B) granting to the petitioner such other and further relief as may be just and equitable.

/s/ James D. Porter

/s/ Norman H. Quale

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(*Appendix A*)

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APPENDIX B

65 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

BADGER METER MANUFACTURING COMPANY,
Petitioner and Movant,

vs. No. 59-C-119

JAMES B. BRENNAN, in his capacity as United States Attorney for the Eastern District of Wisconsin; and

EMIL B. NELSON, in his capacity as District Director of Internal Revenue,
Respondents.

PHILIP J. BERNER,
Petitioner,

vs. No. 59-C-125

JAMES B. BRENNAN, United States Attorney for the Eastern District of Wisconsin,
Respondent.

MEMORANDUM

The petitioners in these two actions, being Badger Meter Manufacturing Company in Case No. 59-C-119, and Philip J. Berner, its secretary-treasurer in Case No. 59-C-125, request return of certain property and its suppres-

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sion as evidence in any criminal proceeding and seek to restrain the named respondents, their agents, etc. from using such property as evidence in any criminal proceedings. The actions were consolidated for hearing, at which hearing, the following facts were established:

On January 4, 1954, Frederick C. Stieber, then and now a special agent of the Intelligence Division of Internal
66 Revenue Service was orally assigned by his superior to make an investigation of Badger Meter Manufacturing Company, hereinafter referred to as Badger. On that date, he interviewed an informant and at that time or shortly thereafter, obtained the informant's affidavit which stated that in the course of selling water meters to various municipalities, it was the policy of Badger to make kickbacks to certain city officials or employees at the rate of 10% of the cost of the water meters purchased and that Philip J. Berner was the company official who carried out that policy. The informant told Stieber that the kickbacks were paid through the medium of advances to salesmen. On January 7, 1954, Stieber, who, as a special agent, was concerned with investigating for possible criminal tax violations, requested that a case number be assigned to the investigation of Badger, indicating that at that time he believed his informant was reliable and that a full scale investigation was warranted.

Thereafter and on January 18, 1954, the Chief of the Intelligence Division sent a memorandum to the District Director, stating that an informant had presented information relative to alleged violations by Badger for the years 1949 to 1951 which would warrant a joint investigation and asking that an internal revenue agent be

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assigned to participate with Stieber in such an investigation. On January 20, 1954, Revenue Agent Franklin P. Graf, who had previously been assigned to audit the company's 1951 income tax return, was assigned to participate with Stieber in the joint investigation. He and Stieber had a short conference on or about that date during which Stieber informed Graf that the investigation concerned kickbacks to public officials.

There is a dispute in the evidence concerning the early stage of the investigation. It is the position of the petitioners that Revenue Agent Graf appeared at Badger at least two weeks before Special Agent Stieber and examined its books and records for ten days under the guise
67 of conducting an audit of the company's 1951 return, before being joined by Stieber on July 12, 1954. The respondents admit that Graf commenced his audit prior to the appearance of Stieber and did not then reveal either that he planned to investigate years prior to 1951 or that a joint investigation was in progress. They contend, however, that Graf spent only two days at the plant alone — July 1 and 2, 1954, and that Stieber and he appeared together on July 6th when Stieber was identified as a Special Agent. We have examined the conflicting evidence on this point, and it is our belief that Revenue Agent Graf began to examine the records of the company at least two weeks prior to July 6, 1954, and conducted such examination for ten days before being joined for the first time by Special Agent Stieber. In making this finding we have rejected Graf's unsupported testimony that he was at the company's plant for only two days, July 1st and 2nd, before Stieber's first visit on July 6th because

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Graf admittedly had almost no independent recollection of his investigation. Although he testified that his report showed that he began his investigation on July 1, 1954, that report was not offered in evidence. We have accepted July 6th as the date when the Special Agent appeared on the scene openly because it is supported by other evidence not dependent upon the memory of any witnesses. We further find that Graf went to the plant alone with the knowledge and consent of Stieber, who, as special agent, was in charge of the joint investigation, and that Graf was aware of the fact, when he went to the plant that the prime subject of the investigation was the kickback policy of the company and that the prime target of the investigation was Berner. We must also find that at all times after conferring with his informant in January, 1954, Special Agent Stieber well knew that Berner and not the company was the target of any criminal investigation, and we find that Graf was aware of this fact on his first visit to the company's plant.[1]

68 While working at the plant prior to July 6, 1954, Graf informed no one that he was participating in a joint investigation, stating only that he was to audit the books. Neither did he inform anyone that years prior to 1951 were being investigated. He received the cooperation of company personnel and was refused access to no records requested by him.

What we consider to be the second stage of the investigation commenced on July 6, 1954, when Special Agent Stieber began his open participation therein by joining

[1]Although Stieber testified that the informant's affidavit set forth "more than one name" of persons principally concerned with Badger's kickback practice, this was not true. The affidavit named Berner only as the person carrying out the policy.

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Graf at the plant. It is uncontroverted that Stieber identified himself as a Special Agent on that date, but informed no one that he was there to conduct joint investigation with criminal implications. Company officials, including Berner, were then informed, however, that the Revenue Service had information that the company was allegedly making kickbacks through its salesmen. Stieber and Graf, working together, continued to receive the cooperation of company personnel after Stieber's identification as a Special Agent and after learning that the Revenue Service was concerned with kickbacks.

Prior to going to Badger's plant on July 6, 1954, Stieber had information about the existence of records regarding kickbacks, but had no description of any such records. Within several days thereafter, however, Stieber obtained from the company records, the name of Mrs. Towle, former secretary of Berner. He then interviewed Mrs. Towle, who gave him information describing the record as a "black book" and locating that book as being in a closet in Berner's office.

When Stieber began his investigation on July 6th and thereafter, he examined salesmen's expense accounts and ledger sheets looking for advance payments to salesmen and transcribing and abstracting from those records. On July 27, 1954, he requested Berner to furnish salesmen's correspondence files and Berner referred him to the company's attorney. After a conference with the attorney those files were produced. On that date, Badger admits,
69 its attorney was informed that the investigation was a criminal investigation. Badger continued to make requested records available for examination thereafter.

The third stage of the investigation then began. On August 6, 1954, after interviewing Mrs. Towle, Stieber

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and Graf had a conference with Berner. Stieber asked for the black book and suggested that it was in Berner's closet, whereupon Berner told him to go and look if he thought it was there. Stieber looked and did not find it. It would appear that no flat denial of its existence was made by Berner, but rather that there was considerable fencing and "jockeying", since it is clear that Berner told the agents on that day that he would call them on August 16th or 17th to give them a decision, and Graf, at least, interpreted that as a statement that he was going to give a decision about producing the black book.

By August 25, 1954, Berner was represented by counsel, who inquired whether he should file a power of attorney. Stieber informed Berner's attorney that he was examining Badger and not Berner. When questioned by adversary counsel and the court whether it was policy to commence prosecutions against corporations, Stieber disclaimed knowledge of policy but admitted that he knows of no prosecutions that were begun against corporations, giving rise to a fair inference that he was aware from the beginning of his investigations that he was investigating to determine possible criminal liability of an individual connected with Badger, that individual being Berner, the only person named by his informant.

We now come to what we consider to be the fourth stage of the investigation. On October 11, 1954, Berner, Secretary-treasurer of Badger, was summoned to appear before Stieber on October 21, 1954, to give testimony with respect to the tax liability of the company. He was directed to bring with him:

70 "The ledger book containing certain recordings relating to advance payments made to various salesmen of the Badger Meter Manufacturing Company; said

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ledger book containing sheets on which is recorded data relating to customers, invoice numbers, amounts of payments by customers, which form the basis for the advance payments to the salesmen."

Berner appeared as directed and was represented by counsel when he appeared. When he was asked whether he had produced the ledger book set forth in the summons, his attorney stated his legal position to be that *corporate* ledgers relating to salesmen's advances had been made available and that there was no single *corporate* record with that information. The attorney further stated that Berner denied that he had any *corporate* record as described, but neither admitted nor denied custody or control of a private record. He added that if the subpoena referred to a private record, Berner refused to produce it if he had it or to testify with respect to it on the grounds that he might be incriminated thereby. These statements were approved by Berner. His counsel also indicated that he knew the investigation was for the purposes of considering possible criminal prosecution (though the investigation was still ostensibly of the company) and that evidence sought might incriminate Berner. At this stage it is clear that Berner knew he was a potential defendant in a criminal prosecution.

On February 3, 1955, Stieber filed a petition in this court alleging that Internal Revenue Service was investigating the tax liabilities of Badger, that Berner failed to comply with the summons of October 11, 1954 by failing to produce the corporate record described therein and in his custody as an official of the company or to testify with respect to the contents thereof and asking that a writ of attachment be issued pursuant to § 7604 of the 1954 Internal Revenue Code directing the United States Marshal to bring Berner before the court to show cause

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for his failure to comply, and that upon a hearing, the court order Berner to testify concerning the company. The court issued an order for attachment stating that
71 Berner had not complied with the summons in violation of various sections of the Internal Revenue Code of 1954, directing the Clerk of Court to issue a writ of attachment, directing the Marshal to serve and execute the writ and ordering that upon the arrest of Berner he be brought before the court for a hearing. The writ was issued and Berner came before the court with his attorney on February 7, 1955. No objection was made by him or his attorney to the issuance of the writ or any of the proceedings before the court, and, on agreement of the parties, the matter was held in abeyance and Berner released on his own recognisance. No order was entered directing Berner to produce any records or give any testimony.

On March 4, 1955, Berner, again represented by very able counsel, appeared before Stieber. Badger's counsel was also present. Berner produced *two* ledgers, in compliance with the summons of October 11, 1954, and was given a receipt therefor describing the books produced as "1 black three ring binder containing 93 pages" and "1 black two post ledger containing 191 pages". Neither Berner, his attorney, nor the attorney for the company made any objection to production of these records. This material was photostated by Stieber and returned to Berner on March 16, 1955. Berner gave his receipt. The court proceeding was dismissed on March 11, 1955 on motion of the United States.

After obtaining photostats of the two books, Stieber requested and examined various records of the company.

No attempt was made at the hearing to identify all of the evidence which the petitioners seek to suppress. It was

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agreed by the parties that if the court determines that the petitioners are entitled to the relief sought they would stipulate to the evidence affected by that decision.

72 The investigation by Internal Revenue commenced, as we have stated, in 1954. On June 8, 1959, a complaint was presented to the United States Commissioner charging Berner with a violation of § 145(b), of the Internal Revenue Code of 1939 in connection with filing the company's return for the year 1952. This complaint, filed only two days before the statute of limitations for that year had run, was dismissed. Further prosecution involving that year is apparently barred. It is our understanding that prosecution involving the year 1953 was planned but that the statute of limitations for that year had run before action was taken. The only criminal case now pending in any way relating to the investigation previously described is Criminal Action No. 59-CR-94 in which Berner has been charged in a two count indictment with violating § 1001, Title 18, U.S.C. by falsely stating to Stieber and Graf on August 6, 1954 that no corporate record of advances to salesmen existed and by falsely stating (through his attorney) on October 21, 1954 in response to an administrative summons issued *October 21, 1954* [sic] that no corporate record as described in the summons existed.

Badger contends that all information obtained by Stieber and Graf from its books and records before July 27, 1954, the day when its attorney was told that a criminal investigation was in progress, and all evidence obtained through leads gotten during that period, were obtained during an unlawful search and seizure in violation of its rights under the Fourth Amendment to the United States Constitution. It also contends that the

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ledgers delivered to Stieber on March 4, 1955, and evidence obtained through leads gotten from the ledgers, were procured in violation of its rights under the Fourth Amendment because they were uncovered as a result of leads gotten prior to July 27, 1954, and because they were obtained by use of unlawful process. It asks that all said material be returned and suppressed as evidence against itself and any of its past or present officers or employees in any criminal proceeding.

73. Berner challenges the legality of the examination of Badger's records prior to July 27, 1954 and claims standing to ask suppression of all evidence obtained by means thereof because while the investigation was purportedly of Badger, in truth and in fact it was directed at him and he was the victim thereof.[2] He also contends that all oral statements made by him from the beginning of the investigation to and including August 6, 1954 were evidence obtained in violation of his rights under the Fourth and Fifth Amendments, and that statements made before Stieber on October 21, 1954 and March 4, 1955, the ledgers delivered to Stieber on March 4, 1955 and all evidence obtained as a result of leads found in the ledgers were also obtained in violation of his rights under the Fourth and Fifth Amendments.

The respondents contend primarily that the petitioners consented to the examinations here complained of and that Berner waived the rights under the Fifth Amendment which he here claims were violated.

[2]In his brief, Berner claims that some material was taken from his own private office during that time, giving him rights not derived through the corporation to object to the search and seizure but no evidence supports this claim.

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We have examined the entire record herein and have considered with care the arguments of counsel presented in their extensive briefs and the many authorities upon which they rely, and have concluded that no violation of Badger's rights under the Fourth Amendment or Berner's rights under the Fourth and Fifth Amendments has been shown and that these actions must be dismissed.

At the outset we must state that we are here concerned only with the rights of Badger and Berner, the only parties appearing to assert that their rights have been invaded. Insofar as Badger seeks suppression of certain material as evidence against any of its past or present officers or employees, its petition must be summarily denied.

It is clear that Badger consented to examination of its books and records by Graf and Stieber during the first
74 two stages of the investigation. Both Badger and Berner argue that this consent was not voluntarily and understandingly given, but rather was procured by fraud and deceit of the agents in failing to apprise Badger that a joint investigation, being "one that is initiated when probable fraud is indicated" (*United States v. Wolrich* (S. D. N.Y. 1955) 129 F. Supp. 528 at 529) was being conducted and in misleading Badger into believing that the examination was a routine audit for the purpose of investigating civil liability only. We do not agree. We believe this case indistinguishable in any material respect from *United States v. Wheeler* (W. D. Pa., 1959) 172 F. Supp. 278,[3] wherein the court stated at Page 283:

> "It is established that failure to warn a person suspected of crime of his constitutional rights does not

[3]For a full statement of the facts upon which the defendant in that case relied in asserting that certain evidence must be suppressed, see *United States v. Wheeler* (W. D. Pa., 1957) 149 F. Supp. 445.

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> of itself make his confession or admissions involuntary, Wilson v. United States, 1896, 162 U.S. 613, 623, 16 S. Ct. 895, 40 L. Ed. 1090; Powers v. United States, 1912, 223 U. S. 303, 313, 32 S. Ct. 281, 56 L. Ed. 448. And it seems to be pretty well settled that if a taxpayer freely consents to a tax examination of his records at the request of an internal revenue agent, as was done in this case, it is not to be concluded that his consent was enticed, induced, or rendered involuntary by the failure of the agent to divulge the purpose and instructions of his superiors or to warn the taxpayer that he is under suspicion of criminality. Turner v. United States, 4 Cir., 1955, 222 F. 2d 926, a case involving both the Fourth and Fifth Amendments. See, also, United States v. Achilli, 7 Cir., 1956, 234 F. 2d 797, affirmed 1957, 353 U. S. 373, 77 S. Ct. 995, 1 L. Ed. 2d 918; Vloutis v. United States, 5 Cir., 1955, 219 F. 2d 782; United States v. Burdick, 3 Cir., 1954, 214 F. 2d 768; Montgomery v. United States, 5 Cir., 1953, 203 F. 2d 887, where the agent made affirmative representations that the investigation was 'purely a civil matter'."

In affirming the defendant's conviction in that case, the Court of Appeals for the Third Circuit stated in *United States v. Wheeler* (1960) 275 F. 2d 94, at Page 97:

> "The important relevant inquiry in this case is whether appellant freely gave his consent to have his rec-
> 75 ords examined with the knowledge that his returns were being investigated. The answer to that inquiry is unequivocally, yes."

The court responded thus to its own inquiry despite the fact that in that case a revenue agent had been sent by his superiors to conduct a routine investigation of the defendant's records "with the additional mission of ascertaining involvement of Internal Revenue employees and defend-

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ant in any wrongdoing with a view to obtaining facts which would lead to criminal prosecution." (149 F. Supp. 445, at Page 448) and that defendant was not informed of the underlying purpose of the investigation.[4]

In the instant cases, Badger concededly consented to examination of its records by Graf prior to July 6, 1954 and by Graf and Stieber to July 27, 1954. Its consent was given without coercion or duress and without promise of immunity from criminal liability or assurance that criminal liability would not be checked. We do not believe that the failure of the agents to inform anyone at Badger that the investigation was being conducted with a view to determining criminal as well as civil liability amounted to fraud, trickery or deceit vitiating the consent given.

We also believe that even if it were held that the failure to disclose the criminal implications of the investigation vitiated Badger's consent, the period affected by that failure is the period when Graf alone conducted the examination, that is, the period prior to July 6, 1954. On that date, Stieber's participation in the investigation was revealed and he was identified as a special agent. This identification, plus the information given on that date that the Revenue Service had heard that Badger was making kickbacks through its salesmen was sufficient to warn company officials that the investigation could have criminal implications.

In holding that the examination of Badger's records
76 prior to July 27, 1954 was conducted with Badger's consent and without violation of its rights under the Fourth Amendment, we place considerable reliance on the opin-

[4]We do not consider it significant that the criminal investigation initiated in the *Wheeler* case prior to the revenue agent's examination did not relate to tax evasion.

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ion of our own Court of Appeals in *United States v. Achilli* (1956), 234 F. 2d 797.

Since the examination made prior to July 27, 1954, did not violate Badger's rights under the Fourth Amendment, we need not consider Berner's contention that he has standing to seek suppression of material obtained from the company during that period. Neither need we consider his contention that the Fourth Amendment requires suppression of statements made by him to the agents during that period since no unreasonable search and seizure occurred. We must, however, consider whether oral statements and admissions made by him to the agents through August 6, 1954 were obtained in violation of his rights under the Fifth Amendment. As we have stated previously, it is the position of the respondents that Berner's rights under the Fifth Amendment were waived.

The evidence reveals that neither Stieber nor Graf informed Berner that their investigation might lead to a prosecution of him, and that they were fully aware of the fact that he was the target of the investigation. Knowing this, Stieber stated as late as August 25, 1954, that he was examining Badger and not Berner, when asked by Berner's counsel whether a power of attorney should be filed.

We do not believe that Berner's rights under the Fifth Amendment were violated as a result of the conduct of the agents. Such a holding should in no wise be construed as approval of the methods and tactics here found to have been used. Berner made statements to the agents. He made them voluntarily, but without being informed of his rights and without being told that he himself was under suspicion. His counsel apparently concedes, however, that the failure to inform Berner of his constitutional

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77 rights did not, in and of itself, violate those rights. While the agents deliberately led him to believe that only Badger was being investigated, no claim is made by Berner that any promise of immunity was made to him or that he was given the impression that he would not be prosecuted. We cannot hold that Berner, in making statements to the agents, did not make them voluntarily and understandingly merely because he was not previously informed that he himself was under investigation.

In support of his contention that statements made and records delivered to Stieber on October 21, 1954 and March 4, 1955, were procured in violation of his rights under the Fourth Amendment, Berner first claims that Stieber had no authority under § 602, Title 26 U. S. C. to summon him to appear before him, stating that under that section a summons can properly be issued only to aid in the determination and collection of civil tax liability, and that the Internal Revenue Code does not authorize issuance of a summons in support of a criminal investigation. We have examined the summons of October 11, 1954. That summons related to the tax liability of Badger. It may be that the criminal matter was in mind, but in our opinion issuance of the summons was justified by the existence of an investigation into any possible civil tax liability on the part of Badger.[5] It has not been shown that such an investigation did not exist.

Neither do we agree with the argument that putative criminal defendants cannot constitutionally be summoned under § 7602. The section itself does not limit the class of persons who may be summoned, and of course persons

[5]See *Lash v. Nighosian* (C. A. 1, 1959) 273 F. 2d 185, cert. den. 1960, 362 U.S. 904, and *Boren v. Tucker* (C. A. 9, 1956) 239 F. 2d 767.

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summoned are always free to assert their constitutional privileges.

Berner also asserts that by virtue of the issuance of the summons he was compelled to produce the ledgers—per-
78 sonal records or corporate records held in a personal capacity—and to make statements in violation of his rights under the Fifth Amendment. In our opinion the record clearly shows that any statements made by him before the special agent on October 21, 1954 and March 4, 1955, were voluntarily made, that the records produced by him on March 4, 1955 were voluntarily produced, and that any rights which he may have had with respect thereto under the Fifth Amendment were waived. Berner was represented by counsel during both appearances before Stieber, and invoked the protection of the Fifth Amendment during his first appearance. The mere fact that he appeared, produced records and made statements by reason of a summons does not constitute a violation of his rights under the Fifth Amendment. He was at all times free to assert those rights but he and his counsel chose not so to do.

We reject completely the contention that the commencement of enforcement proceedings in this court constituted unlawful coercion and compulsion resulting in Berner's surrendering the ledgers on March 4, 1955. No order was entered by this court directing Berner to comply with the summons of October 11, 1954, and it was at all times apparent that such an order would not be entered without Berner being afforded a hearing.

Because the ledgers produced on March 4, 1955, were not obtained in violation of Berner's rights under the Fourth and Fifth Amendments, we need not consider

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Badger's contention that seizure of the ledgers in violation of Berner's rights violated its own rights under the Fourth Amendment.

Both petitioners have complained of violations by the agents of the Internal Revenue Manual. These contentions cannot properly be made in pre-indictment petitions to suppress.

We have not considered herein the standing of each petitioner to ask the relief sought. The title as between the two petitioners to the ledgers which, we assume, are
79 the prime evidentiary matters sought to be suppressed, need not and cannot on the record before us be determined.

Because in our opinion the rights of the petitioner in Civil Action No. 59-C-119, Badger Meter Manufacturing Company, under the Fourth Amendment, and the rights of the petitioner in Civil Action No. 59-C-125, Philip J. Berner, under the Fourth and Fifth Amendments, have not been violated, the relief requested in these actions must be denied.

This memorandum shall stand as and for findings of fact and conclusions of law within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure. Counsel for the respondents will prepare an order for judgment and submit it to opposing counsel for approval as to form.

Dated, Milwaukee, Wisconsin, this 15th day of August, 1962.

ROBERT E. TEHAN
U. S. District Judge

(*Appendix B*)

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APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

BADGER METER MANUFACTURING COMPANY, *Petitioner and Movant,* *vs.* JAMES B. BRENNAN, in his capacity as United States Attorney for the Eastern District of Wisconsin; and EMIL B. NELSON, in his capacity as District Director of Internal Revenue, *Respondents.*	No. 59-C-119

CERTIFICATE OF CLERK

88 I hereby certify that I am Clerk of the United States District Court for the Eastern District of Wisconsin, and that the following information has been transcribed accurately from records on file in this Court:

On June 29, 1959, Petitioner filed a "MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION", in Civil Action No. 59-C-125, which was then entitled *Philip J. Berner, Petitioner, v. Edward G. Minor, United States Attorney for the Eastern District of Wisconsin, and Frederick C. Stieber, Special Agent, Internal Revenue Service, Respondents.*

The following extract has been taken from pages 33-34 of the above-described brief:

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"For the purposes of the hearing and decision on this pre-indictment motion to suppress, the Court may assume that the records in question were corporate records. Petitioner does not intend to adduce testimony at this time to support his position that the records were personal and private records. Petitioner does not, however, waive the right to present such evidence in any future proceeding of any nature."

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Dated at Milwaukee, Wisconsin, this 26th day of December 1962.

/s/ Dale E. Ihlenfeldt
Dale E. Ihlenfeldt,
Clerk.

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APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

BADGER METER MANUFACTURING COMPANY, *Petitioner and Movant,* *v.* JAMES B. BRENNAN, in his capacity as United States Attorney for the Eastern District of Wisconsin; and EMIL J. NELSON, in his capacity as District Director of Internal Revenue, *Respondents.*	CIVIL ACTION No. 59-C-119

ORDER FOR JUDGMENT

80 This cause having come on for hearing before the Court on July 15, 1959, Badger Meter Manufacturing Company, Petitioner, appearing by Messrs. James D. Porter, Esquire, Irving W. Zirbel, Esquire and Norman H. Quale, Esquire, its counsel, and having been consolidated for trial with the cause, *Philip J. Berner, Petitioner, v. James B. Brennan, United States Attorney for the Eastern District of Wisconsin,* Civil Action No. 59-C-125 and the issues having been duly tried and the Court having issued its opinion on the 15th day of August, 1962, containing its Findings of Fact and Conclusions of Law; now, therefore, upon all of the records, files and proceedings had herein,

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IT IS HEREBY ORDERED as follows:

1. That the relief requested in the above-entitled ac-
81 tion by the Petitioner be denied and that this action be dismissed.

2. The Clerk is directed to enter final judgment in accordance with the foregoing provision of this Order.

Dated at Milwaukee, Wisconsin, this 25 day of September, 1962.

/s/ Robert E. Tehan
United States District Judge for
the Eastern District of Wisconsin

APPROVED AS TO FORM:

/s/ James D. Porter
/s/ Irving W. Zirbel
Attorneys for Badger Meter
Manufacturing Company

/s/ Philip L. Padden
Attorney for Respondents
Asst. United States Attorney

(*Appendix D*)

APPENDIX E

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

November 29, 1962

Before

Hon. WIN G. KNOCH, Circuit Judge
Hon. LATHAM CASTLE, Circuit Judge
Hon. ROGER J. KILEY, Circuit Judge

BADGER METER MANUFACTURING COMPANY, *Petitioner-Appellant,* *vs.* No. 13977 JAMES B. BRENNAN, in his capacity as United States Attorney for the Eastern District of Wisconsin; and EMIL B. NELSON, in his capacity as District Director of Internal Revenue, *Respondents-Appellees.*	Order Dismissing Appeal

On consideration of the motion of respondents-appellees to docket and dismiss this appeal, the petitioner-appellant's brief in opposition thereto and the affidavit filed therewith, and the reply brief of respondents-appellees;

And it appearing that pursuant to an order entered herein November 6, 1962, this appeal has been docketed;

And it further appearing that the order sought to be appealed is interlocutory and not an appealable order under the doctrine and principles of DiBella v. United States, 369 U.S. 121;

IT IS ORDERED that respondents-appellees' motion to dismiss this appeal is ALLOWED and the appeal herein is DISMISSED.

APPENDIX F

Applicable Provisions Of The Statutes And Rules Involved

United States Code, Title 28, §1254(1):

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

United States Code, Title 28, §1291:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court."

Federal Rules of Civil Procedure

Rule 1, second sentence:

> "They [these rules] shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 8(a), second sentence:

> "Relief in the alternative or of several different types may be demanded."

Rule 8(f):

> "All pleadings shall be so construed as to do substantial justice."

Rule 54(c), second sentence:

> "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

APPENDIX G

Statement Of The Case Which Will Be Reviewed If The Judgment Of The Court Of Appeals Is Vacated

The following summarizes the facts of the case that will be reviewed, if the judgment of the court of appeals is vacated on certiorari. Dispute exists among the circuits as to the legal effect of some of them.

The tax investigation was a criminal one, with Berner (and not the Company) as its sole target, from its inception in January, 1954. (App. B, pp. 5, 6, 8; R. 65-68). Knowing all this, a Revenue Agent (an auditor), went to the Company plant alone, with the knowledge and consent of one Stieber, a Special Agent of the Intelligence Division (a trained detective), who directed the criminal investigation. (App. B, pp. 7, 8; R. 67, 102, 103, 303).[1]

The auditor represented that he had come to make an audit of a Company tax return, and received full cooperation. (App. B, pp. 7, 8; R. 67, 68). He remained alone at the plant for ten days through Friday, July 2, 1954, actually working on the investigation, but stating only that he was auditing the books. (App. B, p. 8; R. 68).

The detective first appeared from behind the scenes by means of accompanying the auditor on his return to the plant on Tuesday, July sixth, after the long, holiday

[1]Such an investigation is called a "joint" investigation in internal regulations of the Service, i.e., Part 9 of the Internal Revenue Manual, and Chapter 10 of the Handbook for Internal Revenue Agent (R. 104). Among other things, they prescribe standards of fair play to be observed by Agents in investigations and audits. (Pet. Exs. 15, R. 418; 17, R. 420; 18, R. 421; and 20, R. 423; all offered and received without objection at R. 327). The trial court admitted such regulations in evidence, but concluded that complaints of violations of them could not properly be made in "pre-indictment motions to suppress". (App. B, p. 21; R. 78).

weekend. (App. B, pp. 8, 9; R. 68, 298). He merely introduced himself as "Special Agent Stieber"; said nothing about the Intelligence Division; and said nothing about either of them being there to conduct an investigation with criminal implications. (App. B, p. 9; R. 68). One of the agents remarked that the Service had information that the Company was allegedly making kickbacks through its salesmen. (App. B, p. 9; R. 68). The auditor and the detective then began work together at the plant, with the continuing full cooperation of Company personnel. (App. B, p. 9; R. 68).

Within "several" days after July 6th, the detective obtained the name of a Mrs. Towle, a former secretary of Berner's, from the Company records. (App. B, p. 9; R. 68). ("Several" is the court's language. The detective testified that it was on July seventh or eighth, "somewhere in there". [R. 304]). He then interviewed Mrs. Towle, who gave him information in which she described a record, of which he had had no description before, and located it as being kept by Berner in his office closet. (App. B, p. 9; R. 68, 304). First he interviewed Mrs. Towle; and his diary entries reveal that then, on August 4, 1954, he prepared questions to ask her under oath; and on August 5, 1954, formally interrogated her under oath as to the record. (R. 59, 240).

The detective then subpoenaed (ostensibly still in an investigation of the "tax liability of the Company"), and obtained two ledgers, which constituted the record about which Mrs. Towle had told him. (App. B, pp. 10, 11; R. 69, 70). After photostating and returning them, he demanded, examined, copied or transcribed and returned various records of the Company. (App. B, p. 12; R. 71). He then sent the copies and transcriptions to Intelligence

Division offices around the United States, in order that their agents might interrogate Company salesmen. (R. 313-315).

Now, in this Appendix, we summarize the Company's contentions as follows:

First, all evidence seized by the Revenue Agent (the auditor) prior to July 6, 1954, was unlawfully seized because of his misrepresentation that he was merely engaged in a routine tax audit.

Second, we contend that Mrs. Towle's name was unlawfully searched for and seized; and that the leads, clues and property which the detective obtained as a result, i.e.: the information Mrs. Towle gave him, the ledgers he seized by means of that information, and the information and records he obtained from the ledgers, all were tainted by the initial illegality which attached to the obtaining of her name.

Our second contention, above, rests upon our disagreement with the district court's conclusion that, notwithstanding ten days had elapsed in the course of a supposedly normal, routine tax audit and thereupon the auditor was quietly accompanied by a companion on the auditor's return after a holliday weekend, the companion's introduction as, merely, a special agent, plus a remark that the Revenue Serwice had heard that the Company was making kickbacks through its salesmen, was sufficient to warn Company officials that the investigation could have criminal income tax implications. (App. B, p. 17; R. 75). Even the Revenue Agent (the auditor), who had been a Revenue Agent for almost six years (R. 124) and apparently had participated in other joint, criminal investigations (R. 193), testified that the mere designation

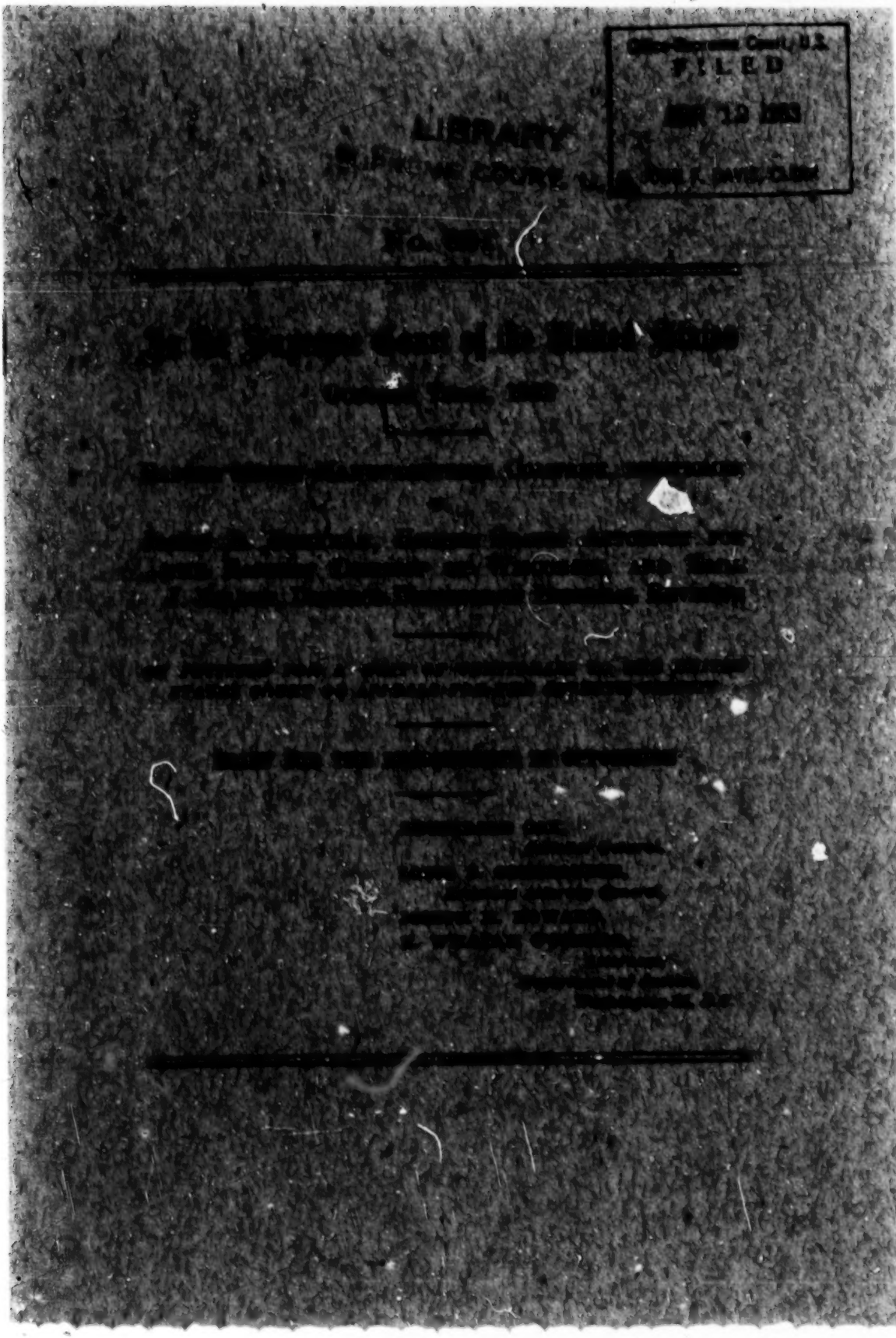
"special agent" would not imply a criminal investigation to anyone who did not have an appreciation of rank within the Revenue Service. (R. 199, 200).

Third, and finally, the Company contends that the taint of illegality continued to attach to property obtained from Company records made available upon the special agent's demand after July 27, 1954. In this contention the Company disagrees with the district court's contrary conclusion, which the court based upon the fact that on that date the special agent informed the attorney for the Company that he was engaged in "a criminal investigation"; and thereafter the Company continued to make requested records available for examination. (App. B, p. 9; R. 68, 69). The court implied in its opinion, incorrectly, that the Company conceded that only property seized as the result of leads obtained prior to July 27, 1954, was unlawfully seized. (App. B, pp. 13, 14; R. 72). The Company did not, and does not make any such concession.

The Company's third contention is grounded upon two arguments. We call attention, with respect to the occurrences on July 6, 1954, that if the words "special agent" had been addressed to a knowledgeable person to whom that designation also carried with it the words "Intelligence Division" and "detective", nevertheless the agents had given to their criminal investigation the erroneous appearance of a routine audit which had turned up suspicions of fraud, and in which they were acting fairly and above-board, in conformity with the Handbook for Internal Revenue Agent (Pet. Ex. 20, R. 423, 327). The respondents (the Government) bore the burden of proving, but failed to introduce any evidence to prove, that either any Company official, or the Company's lawyer on

July 27, 1954, were aware of the true state of affairs. Once a citizen has been so far misled by the conduct of government officers, as the Company had been misled, compliance with their further demands, even after so limited a disclosure of the officers' true purpose as was made on July 27, 1954, does not constitute a knowing and willing consent to, or waiver of, the taint which attached to the officers' illegal conduct and the fruits of that conduct.

(Appendix G)



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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 821

BADGER METER MANUFACTURING COMPANY, PETITIONER

v.

JAMES B. BRENNAN, UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF WISCONSIN, AND EMIL J. NELSON, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the district court (Pet. App. 5–21) and the order of the court of appeals (Pet. App. 26) have not been reported.

JURISDICTION

The order of the Court of Appeals was entered on November 29, 1962 (Pet. App. 26). The petition for a writ of certiorari was filed on February 12, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the order denying the motion to suppress and return copies of books and records, which petitioner alleges were obtained illegally from it, was appealable as a final order in an independent proceeding after the original documents had been returned.

STATEMENT

Petitioner, Badger Meter Manufacturing Company, sells water meters to various municipalities. Early in 1954 the Internal Revenue Service received reliable information that petitioner had a policy of "kicking back" ten percent of the sales price to municipal officials; that Philip J. Berner, secretary-treasurer of petitioner, was carrying out the policy under the guise of advancing expenses to salesmen; and that there had probably been criminal tax violations by petitioner for the years 1949 to 1951. Further information indicated that petitioner had kept records of the kickbacks. Late in June 1954 Revenue Agent Graf was sent to petitioner's office where he asked permission to examine the books in order to audit the corporation's 1951 return. On July 6, after he had spent about ten days in the office working on the books, he returned, accompanied by Special Agent Stieber who identified himself as a special agent, and stated that he had information about kickbacks. Both agents were allowed to continue the examination, making transcripts and abstracts from some of the books. They uncovered a lead which brought them to information that the kickbacks were recorded in a "black

book" kept in Berner's office. On July 27 Special Agent Stieber asked Berner for certain specific corporate files, and at the same time he informed the corporation's counsel that a criminal investigation was in progress. The files requested were produced. On August 6 the agents asked Berner for the "black book," but Berner said that he would not make a decision on this request until August 16 or 17 (Pet. App. 6–10; R. 16–17).

On October 11 an Internal Revenue summons was issued to Berner, directing him to testify concerning petitioner's tax liabilities, and to produce the corporate ledger recording the kickback payments (R. 18, 21, 23). When Berner was asked for the ledger, his counsel answered that there was no corporate ledger containing the kickback records; that Berner would neither admit nor deny possession of a private ledger of the sort described in the summons; and that he would claim his privilege against self-incrimination if the summons required production of private records (R. 20–21, 23–24). Berner approved this statement by counsel. On February 3, 1955, the government instituted a proceeding in the district court for an order requiring Berner to obey the summons (R. 26–30). The action was held in abeyance for some time by agreement, but on March 4, 1955, Berner produced without objection the two black ledgers (R. 31–32). This material was photostated by the agents, and the originals were then returned to Berner (Pet. App. 10–12, 20, 29; R. 413).

On June 8, 1959, a complaint was filed with the United States Commissioner for the Eastern District of Wisconsin charging Berner with a wilful attempt to evade the taxes of petitioner for the year 1952 (R. 36–38). On August 5, 1959, an indictment was returned against Berner in the same district, charging him with having falsely stated to the revenue agents that petitioner had no corporate record of the kickback payments whereas he well knew that there was such a record (Pet. App. 13).

On June 23, 1959, fifteen days after the institution of the complaint against Berner, petitioner filed a "Petition and Motion for the Return of Seized Property and the Suppression of Evidence" (R. 2, 3). Petitioner alleged that the Internal Revenue Service, although engaged from the outset in a criminal investigation of its income tax returns, obtained access to its books under the pretense of making a routine audit of the returns for the years 1951 and 1952; that the revenue agents made copies of some records, took excerpts from others, and made notes, memoranda, and computations based upon this inspection of the books; that they made copies of the two black ledgers produced by Berner; and that they obtained much secondary evidence as a result of their inspection of the books (R. 6–12). Petitioner claimed that the constitutional rights of Berner and itself had been violated by the agents' actions, and that there was danger that the evidence so obtained would be used in some criminal proceedings against petitioner itself, or against one or more of its officials, particularly Berner

(R. 6, 8, 11–15). Petitioner did not allege that the two black ledgers belonged to it[1] and there was no allegation that the agents had retained any of petitioner's original records.

The prayer for relief asked for the return of original advance and expense checks (Pet. App. 2; R. 4), but there was no allegation that the originals are still in the possession of officers of the United States, and we have been assured by the United States Attorney that all original checks have been returned. The prayer for relief also asked for the return of the originals of the two black ledgers (Pet. App. 3; R. 4), but it is clear from the record that these were returned to Berner very shortly after he produced them in response to the summons (Pet. App. 12; R. 412). The prayer for relief further asked that all copies of the books and ledgers, and all evidence obtained as a result of the agents' examination of the books and ledgers, be returned to petitioner and be suppressed in any criminal proceeding against petitioner, Berner, or any other corporate official (Pet. App. 1–3; R. 3–5).

A few days later Berner filed a similar motion to suppress evidence, alleging that his constitutional rights had been violated by the manner in which the agents obtained the evidence and asking that the respondents be restrained from using it against him in any criminal proceeding (Pet. App. 14). He also

[1] The allegation as to the ledgers was that they "are the property of the petitioner if [the government should succeed in proving] that they were corporate records and not personal records of Berner's * * *" (R. 6).

alleged that the two black ledgers were his personal property.[2]

A consolidated hearing was held on the two motions (Pet. App. 5–6; R. 90–389). It was clear that both petitioner and Berner were seeking the suppression or return, not of original records, but of the copies, excerpts, and memoranda made by the agents during the course of their investigation (R. 71, 172–175, 200, 204, 412, 413). After a careful review of the evidence (Pet. App. 6–14), the district court concluded that petitioner had freely consented to the examination of its books, and that this consent was not vitiated by the failure of the agents to announce at the outset that they were conducting a criminal investigation[3] (Pet. App. 15–18). The motions to suppress were both denied (Pet. App. 21, 24–25). On November 29, 1962, petitioner's appeal was dismissed by the Court of Appeals for the Seventh Circuit on the ground that the order of the district court was interlocutory and non-appealable (Pet. App. 26).

The complaint against Berner for a wilful attempt to evade the taxes of petitioner was dismissed by the district court on June 9, 1961 (Pet. App. 13). On

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[2] Paragraph 30 of Berner's motion reads, in part, as follows: "The records described in Exhibit F [see R. 412], and delivered to Special Agent Steiber * * * were personal and private papers and records of the petitioner * * *."

[3] The district court found it unnecessary and impossible to determine whether the two black ledgers belonged to petitioner or to Berner (Pet. App. 21). Petitioner now urges (Pet. 2) that Berner agreed that the ledgers belonged to petitioner. However, the so-called agreement (Pet. App. 22–23) states that it was made only for the purposes of argument on the motions to suppress, and that Berner reserved the right to present evidence of his ownership of the ledgers in any future proceeding.

October 12, 1962, and on December 10, 1962, the district court entered orders dismissing the two counts of the false statement indictment against Berner which had been pending since August 1959. The United States noted appeals from both orders, but these were dismissed by stipulation in the latter part of February 1963.

ARGUMENT

1. Petitioner argues that, since no criminal action was ever begun against it, its motion to return and suppress evidence was an independent civil action, and that the order denying relief was final and appealable. The petition suggests (Pet. 3, 4, 6) that the respondent officials of the United States still retain some corporate records. If they did, petitioner's action could be treated as a separate and independent suit to recover property, rather than as part of a criminal case, since no criminal case has yet been started against petitioner. The decision by the district court of an independent action would have been final and therefore appealable by the losing party, whether the government or petitioner. See *DiBella* v. *United States,* 369 U.S. 121. However, the fact is that the government returned all of the original records.

The issue in this case on the merits is whether petitioner was entitled to the return of copies of its records which were made by the government and the suppression of evidence. Even though no criminal case has ever been brought against petitioner itself, the sole reason for petitioner's motion for the return of copies and the suppression of evidence is anticipation of a future criminal or civil case against itself

or its officers. Petitioner has no property interest in the copies; indeed, the copies were made by the government and do not even belong to petitioner. As petitioner admits (Pet. 9), the test of whether a proceeding is independent and therefore appealable is essentially practical and pragmatic. See *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 306; *DiBella* v. *United States, supra,* 369 U.S. at 124, 129; *Carroll* v. *United States,* 354 U.S. 394, 404, note 17; *Cogen* v. *United States,* 278 U.S. 221, 225. Applying these standards here there is no reason for considering petitioner's motion as independent of any possible future proceedings.

Petitioner contends (Pet. 3, 5, 8) that, if tax deficiencies are assessed by the government against it, it will be unable to challenge the government's use of the evidence involved here in a later tax proceeding. Therefore, petitioner states, its only opportunity to challenge the government's taking of the evidence is by appeal in this case. The government submits, however, that petitioner is free to raise the same objections to the government's use of the evidence in any future civil or criminal proceeding. It is well established that only final orders may be relied upon as *res judicata. Merriam* v. *Saalfield,* 241 U.S. 22, 28; *Smith* v. *McCool,* 16 Wall. 560, 561; *United States* v. *Davis,* 3 F. Supp. 97, 98 (S.D. N.Y.) Thus, the only benefit to petitioner of allowing it to appeal the denial of its motion at this time is to obtain an immediate appellate ruling. But such a ruling may be a complete

waste of judicial time and effort if the government never brings a civil or criminal proceeding against petitioner.

2. In any event, there is no basis for petitioner's argument on the merits. Petitioner's sole contention (Pet. 8; Pet. App. 28–32) is that the examination by the revenue agents of the corporate records was illegal because they did not state the criminal nature of the investigation at the outset. The courts of appeals have unanimously held to the contrary. *Scanlon* v. *United States,* 223 F. 2d 382, 385 (C.A. 1); *United States* v. *Sclafani,* 265 F. 2d 408, 414–415 (C.A. 2), certiorari denied, 360 U.S. 918; *Grant* v. *United States,* 282 F. 2d 165, 170, 291 F. 2d 227 (C.A. 2), reversed with instructions to dismiss the appeal, 369 U.S. 401; *Russo* v. *United States,* 241 F. 2d 285 (C.A. 2), certiorari denied, 355 U.S. 816; *United States* v. *Frank,* 245 F. 2d 284, 285–286 (C.A. 3), certiorari denied, 355 U.S. 819; *Turner* v. *United States,* 222 F. 2d 926, 930–932 (C.A. 4), certiorari denied, 350 U.S. 831; *Lisansky* v. *United States,* 31 F. 2d 846, 851 (C.A. 4), certiorari denied, 279 U.S. 873; *Montgomery* v. *United States,* 203 F. 2d 887, 892–893 (C.A. 5); *United States* v. *Achilli,* 234 F. 2d 797, 805 (C.A. 7), affirmed on other grounds, 353 U.S. 373; *Hanson* v. *United States,* 186 F. 2d 61, 64–66 (C.A. 8). See also *Wilson* v. *United States,* 162 U.S. 613, 621–624; *Powers* v. *United States,* 223 U.S. 303, 312–314.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1963.

PETITIONER'S REPLY BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 821

BADGER METER MANUFACTURING COMPANY,

Petitioner;

v.

JAMES B. BRENNAN, in his capacity as United States Attorney for the Eastern District of Wisconsin; and EMIL J. NELSON, in his capacity as District Director of Internal Revenue,

Respondents.

PETITIONER'S REPLY TO THE BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Respondents.

PETITIONER'S REPLY TO THE BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

Neither opinion below is reported. The opinion of the district court is Appendix B, pp. 5-21; and the opinion of the court of appeals, dismissing the "order" of the district court as "interlocutory and not an appealable order under the doctrine and principles of *DiBella v. United States*, 369 U.S. 121", is Appendix E, p. 26.

ARGUMENT
(ADDRESSED TO RESPONDENTS' ARGUMENT)

RESPONDENTS' FIRST ARGUMENT IS THAT ALTHOUGH A CITIZEN MAY SUE FOR AND RECOVER ORIGINAL RECORDS ILLEGALLY-SEIZED BY GOVERNMENT OFFICERS, HE MAY NOT RECOVER COPIES OF THE RECORDS MADE BY THE SAME OFFICERS

Respondents Admit That If They Possessed The Original Records, The Company's Action Would Have Been A Separate, Independent, Civil Action And The District Court's Judgment Would Have Been Appealable

Respondents admit three times, on page 7 of their brief, that no criminal case has ever been instituted against the Company. The district court found that no criminal investigation was ever directed against the Company. (App. B, pp. 8, 10, 11, 18, 19; R. 67, 69, 70, 76, 77).

Therefore, in the first paragraph of the respondents' Argument, they concede that if they possessed the originals of the seized Company records (as differentiated from copies of the originals which the government has made and retains), the Company's action to recover the originals would have been a separate, independent action to recover its property, and the district court's judgment would have been final and appealable. (Resp. Brief, p. 7).

Respondents agree that *DiBella v. United States, supra,* 369 U.S. 121, would not apply, if they possessed the original records. (Resp. Brief, p. 7).

But, the respondents contend, "Petitioner has no property interest in the copies; indeed, the copies were made

by the government and do not even belong to petitioner." (Resp. Brief, p. 8). More exactly, the copies were made by the same Special Agent who spearheaded the unlawful search and seizure. (App. B, pp. 9, 12; R. 68, 71).

Copies Of Unlawfully-Seized Records Are No More To Be Retained By Those Who Seized The Originals, Than The Originals Are To Be Retained

There is no substance whatever to the respondents' contention that although the Company had the right to bring a civil action for and recover its illegally-seized original records, the Company was not and is not entitled to the copies of those records made by the officer who seized the originals.

The respondents point to no authority in support of their contention.

Copies of records illegally seized are just as tainted and just as much to be returned, as are the originals of those records. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385. If this were not true, the result would be the result which Mr. Justice Holmes, speaking for the Court in *Silverthorne*, described as follows (251 U.S. 391):

> "The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had."

If the respondents were permitted to retain copies of illegally-seized records, made by the very officer who seized the originals (App. B, pp. 9, 12; R. 68, 71), when they so clearly are part of the "fruit of the poisonous tree", the constitutional and other legal rights for which the

Company is contending would become mere forms of words. See, e.g., *Wong Sun v. United States*, No. 36, this Term, decided January 14, 1963, pp. 13-15 (371 U.S. 471, 484-486 [Prelim. Print]); and *Nardone v. United States*, 308 U.S. 338, 340-41.

HAVING CONCEDED THAT *DI BELLA* DOES NOT APPLY, RESPONDENTS CREATE A STRAW MAN BY REFERRING TO POSSIBLE FUTURE CRIMINAL CASES

Respondents refer, on pages 7, 8 and 9, to the possibility of a "future criminal case" and a "future criminal proceeding" against the Company. But the district court found, and the respondents know, that all future criminal prosecutions for the tax years involved (1953 was the most recent) are time-barred. (App. B, p. 13; R. 72).

RESPONDENTS MISSTATE THE COMPANY'S POSITION AND THE FACTS WITH RESPECT TO THE IMPORTANCE OF THIS CASE IN CONNECTION WITH CIVIL TAX FRAUD CASES

Respondents Misstate The Company's Position

The following statement appears on page 8 of respondents' brief: "Petitioner contends (Pet. 3, 5, 8) that, if tax deficiencies are assessed by the government against it, it will be unable to challenge the government's use of the evidence involved here in a later tax proceeding."

On page 3 of the Company's petition for a writ, under the caption Jurisdiction, the Company stated that the denial by the court of appeals of any right to have reviewed on the merits a trial court's conclusion that a

search and seizure of a citizen's property was lawful, and a trial court's refusal to order a citizen's seized property returned to him, was of special importance for the reason:

> "A decision that such a seizure was unlawful, and the consequent return to a citizen of his seized property, are both of major importance to his ability to defend against the assessment of, *or to recover*, actual penalties founded on the fruits of the unlawful search and seizure by federal officers." [emphasis supplied]

A similar statement, including the phrase "or to recover", together with supporting authorities, was made on pages 8 and 9 of the Company's petition, under the caption Reasons For Granting The Writ.

Respondents Misstate The Facts

Respondents, on page 8 of their brief, imply that no tax deficiencies (much less penalties) have been assessed against the Company, and on page 9 state that "such a [appellate] ruling [at this time] may be a complete waste of judicial time and effort if the government never brings a civil ** proceeding against petitioner."

The facts are that a deficiency, but no penalty, for the year 1951, was assessed, and was paid with interest on August 25, 1955; a deficiency, plus a fifty per cent penalty, for the year 1952, was assessed, and was paid with interest on November 16, 1956; a deficiency, plus a fifty per cent penalty, for 1953, was assessed, and was paid with interest on November 26, 1958; and that claims for refunds of those deficiencies, civil fraud penalties and interest were filed by the Company on approximately August 23, 1957, November 14, 1958, and November 24, 1960, and now are pending.

Notwithstanding the respondents' allegations to the contrary, the government never will need to make an assessment (Cf., Resp. Brief, p. 8), or to bring a civil proceeding against the Company (Cf., Resp. Brief, p. 9). The Company will be compelled to bring an action to recover the penalties.

Finally, respondents argue that there is no point in an appellate ruling at this time on the illegality of the seizures of the Company's property, because "petitioner [the Company] is free to raise the same objection to the government's use of the evidence in any future civil or criminal proceeding." (Resp. Brief, p. 8). In making this argument, respondents disregard the fact that more than nine years already have elapsed since the searches and seizures complained of. And they also disregard the fact that a *voir dire* on a new objection to the receipt in evidence of the seized records might require, as the taking of testimony in this action did, approximately six days. (R. 90-117; 118-389).

Such arguments against the issuance of the writ indicate a disposition, the Company submits, never to permit any appellate court to review the conduct of the Agents, as to which the district court said in its opinion: "Such a holding should in no wise be construed as approval of the methods and tactics here found to have been used [by the Agents]". (App. B, p. 18; R. 76).

But despite all other arguments of the respondents, their concession that the court of appeals erred in dismissing the Company's appeal on the ground of the "doctrine and principles of *DiBella v. United States*, 369 U.S. 121" cannot be evaded. (Resp. Brief, p. 7).

ARGUMENT
(ADDRESSED TO RESPONDENTS' STATEMENT OF THE CASE)

The respondents' Statement in their Brief in Opposition is directed to the merits of the case, rather than to the reasons for granting the writ. (Resp. Brief, pp. 2-7). Therefore, the Company does not encumber this Reply to dispute their version of the merits.

However, we do note two admissions of fact made by the respondents:

First — respondents admit that there is no criminal case, of any kind, pending against Berner. (Resp. Brief, pp. 6, 7).

Second — respondents admit that the Revenue Agents "uncovered a lead which brought them to information that the [alleged] kickbacks were recorded in a 'black book' kept in Berner's office". (Resp. Brief, pp. 2-3). This lead was Mrs. Towle's name and the information she gave the Agents with respect to the ledgers. (App. G, p. 29, first full paragraph).

Also, the respondents' Statement contains two major inaccuracies, which we correct below.

The first inaccuracy exists on page 5 of respondents' brief. There they say as to the copies of the two ledgers which are a portion of the property which the Company seeks to have returned to it: "Petitioner [the Company] did not allege [in its petition to the district court] that the two black ledgers belong to it'"; and they append the following footnote:

> "'The allegation as to the ledgers was that they 'are the property of the petitioner if [*the government should succeed in proving*] that they were corporate

records and not personal records of Berner's * * *' (R. 6)." [emphasis supplied]

The actual allegation in the Company's petition to the district court was:

> "(a) * * *; and the ledgers referred to in subparagraphs (III) and (IV) above were and are the property of the petitioner if, as the respondents have and do contend in attempted justification of their coercing Berner to produce the ledgers, that they were corporate records and not personal records of Berner's; and" (R. 6).

Subparagraph (III) referred to in the Company's allegation quoted above is the subparagraph of the Company's prayer for relief in which the Company specifically asked for the return to it of "all copies of two books (hereinafter called the 'ledgers')," which were described with extreme particularity. (App. A, p. 2; R. 4).

Respondents also misquote the Record in respect of the Company's ownership of the ledgers. In note 3 on page 6 of respondents' brief, they state:

> "Petitioner now urges (Pet. 2) that Berner agreed that the ledgers belonged to petitioner. However, the so-called agreement (Pet. App. 22-23) states that it was made *only for the purposes of argument* on the motions to suppress, * * *." [emphasis supplied]

The fact is that Berner's attorney agreed, and stated in a preliminary brief to the district court, that *"for the purposes of the hearing and decision* on this pre-indictment motion to suppress, the Court may assume that the records in question were corporate records." [emphasis supplied] (App. C., pp. 22, 23; R. 88, 89). That agreement and statement by Berner's counsel constituted evidence before the district court at the consolidated trial

of the Company's and Berner's cases. *Oscanyan v. Arms Co.*, 103 U.S. 261, 263.

CONCLUSION

The petitioner Company respectfully submits that the concessions and admissions in the respondents' brief establish that the writ of certiorari ought to issue to the United States Court of Appeals for the Seventh Circuit, the judgment of said court ought to be vacated, and the case ought to be remanded to said court for review on the merits; or, in lieu of such remand and review, that this Court ought to grant to petitioner such other and further relief as to this Court, in the exercise of its supervisory powers and discretion, may appear just, equitable and advisable.

Respectfully submitted,

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